

COLLECTIVE BARGAINING BY UNIVERSITY AND COLLEGE FACULTIES UNDER THE NATIONAL LABOR RELATIONS ACT

I. INTRODUCTION

With the passage of the Wagner Act¹ in 1935, Congress made its first attempt to regulate labor relations on the federal level. The newly created National Labor Relations Board² was given broad authority over employers and employees whose relations "affected commerce."³ Until recently, however, the Board generally declined to assert jurisdiction over colleges and universities on the broad ground that to assert jurisdiction would not "effectuate the policies of the Act."⁴ This paper will focus on the recent change in policy and the new problems it has presented to the Board.

II. BOARD ASSERTION OF JURISDICTION

A. *Statutory Basis and Pre-1970 Policies*

From the early days of the Wagner Act, it was established that the jurisdictional grant to the Board over questions of representation and unfair labor practices affecting commerce was coextensive with Congress' plenary power under the commerce clause.⁵ The Act also broadly defines "employer" and "employee"⁶ in such a way as to include colleges and universities as employers (except where they may be considered a "political subdivision" of a state) and faculty members as employees.⁷ Prior to 1950, the Board used a "commerciality"

¹ 49 Stat. 449 (1935), as amended 29 U.S.C. §§141 *et seq.* (1970).

² Hereinafter referred to as the "NLRB" or the "Board".

³ Labor-Management Relations Act §2(7), 29 U.S.C. §152(7) (1970) [hereinafter cited as "LMRA" or the "Act"] states:

The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

⁴ Trustees of Columbia Univ., 97 N.L.R.B. 424, 427 (1951).

⁵ See *NLRB v. Fainblatt*, 306 U.S. 601 (1939).

⁶ LMRA §2(2), 29 U.S.C. §152(2) (1970) states:

The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation . . . or any State or political subdivision thereof. . . .

LMRA §2(3), 29 U.S.C. §152(3) (1970) states:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer. . . . but shall not include . . . any individual having the status of an independent contractor, or any individual employed as a supervisor. . . .

⁷ While there may be some argument that faculty members are all supervisors or indepen-

test to determine whether or not it would assert jurisdiction over eleemosynary, nonprofit employers.⁸ This test looked toward the employer's activities rather than to the motive for the activities. Activities that were primarily engaged in "trade, traffic, commerce, transportation, or communication"⁹ were within the scope of this test. Thus the Board asserted jurisdiction in cases involving professional and fraternal organizations, electrical cooperatives, and church-operated publishing houses.¹⁰

In 1951 in the case of *Trustees of Columbia University*,¹¹ the Board declared that it would not "assert its jurisdiction over a non-profit, educational institution where the activities involved are non-commercial in nature and intimately connected with the charitable purposes and educational activities of the institution."¹² Although there may be some question as to whether or not the Board correctly relied on the legislative history of the Taft-Hartley Act,¹³ that case provided a precedent for denying jurisdiction in later cases involving

dent contractors, these have been summarily disposed of by the Board. The point here made is that the Act's definition of "employee" is broad enough to include, generally, faculty members although some individuals might be excluded as supervisors or independent contractors. Most faculty members do not individually supervise or have authority over other employees, and most universities maintain sufficient control over the teaching process to negate the argument that faculty members have an independent contractor status.

⁸ For example, in *Central Dispensary & Emergency Hosp.*, 44 N.L.R.B. 533, 540 (1942), *enforced*, 145 F.2d 852 (D.C. Cir. 1944), *cert. denied*, 324 U.S. 847 (1945), the Board, in asserting its jurisdiction, noted the commercial nature of the employer's business: "[T]he activities of the Hospital, even if they should be regarded as non-profit-making, are within reach of the power of Congress and the terms used by it in conferring jurisdiction on the Board."

⁹ LMRA §2(6), 29 U.S.C. §152(6) (1970) (defining "commerce").

¹⁰ See, e.g., *American Medical Ass'n.*, 39 N.L.R.B. 385 (1942); *Salt River Valley Water Users Ass'n.*, 32 N.L.R.B. 460 (1941); *Christian Bd. of Publication*, 13 N.L.R.B. 534 (1939), *enforced*, 113 F.2d 678 (8th Cir. 1940).

¹¹ 97 N.L.R.B. 424 (1951).

¹² *Id.* at 427.

¹³ See Schramm, *Effects of NLRB Jurisdictional Change on Union Organizing in Private Colleges and Universities*, 23 LAB. L.J. 572 (1972); Comment, *NLRB Jurisdiction Over Private Colleges and Universities—Toward Elimination of the Good Works Exclusion*, 44 TEMP. L.Q. 410 (1971).

The Congressional Conference Committee deleted specific exemptions from the coverage of the Act that had been present in the House Bill. The House exemptions included, in part, organizations "operated exclusively for religious, charitable, scientific, literary, or educational purposes" H.R. 3020, 80th Cong., 1st Sess. §2 (1947). The Conference Committee acted under the mistaken impression that prior Board rulings had held that such organizations were not within the scope of the Act because they did not sufficiently affect commerce:

[N]on profit organizations excluded under the House bill are not specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act.

H.R. REP. NO. 510, 80th Cong., 1st Sess. 32 (1947).

the noncommercial activities of nonprofit organizations.¹⁴ Despite the Supreme Court's approval of the Board's discretionary denial of jurisdiction,¹⁵ Congress gave statutory authority to this discretionary action by the Board in its 1959 amendments to the LMRA.¹⁶

Thus it was clear until 1970 that the Board did not lack statutory authority to assert jurisdiction over private colleges and universities. The Board's position up to that time reflected a policy favoring the exclusion of nonprofit institutions from federal labor regulation, perhaps as a benefit in exchange for providing essential services for the community.¹⁷

B. *The Cornell University Decision*¹⁸

By 1970 the tide had turned, and the Board was ready to reverse its previous categorical refusal to assert jurisdiction over educational institutions. Not only did the Board have the statutory authority to assert its jurisdiction, but the factors which led to the previous discretionary denial were no longer present. The activities of many universities extended into the commercial and social life of the communities

¹⁴ See, e.g., Lutheran Church, Missouri Synod, 109 N.L.R.B. 859 (1954); Armour Research Foundation, 107 N.L.R.B. 1052 (1954); Philadelphia Orchestra Ass'n., 97 N.L.R.B. 548 (1951). The *Columbia* rule was not without its difficulties of application. For example, in Woods Hole Oceanographic Institute, 143 N.L.R.B. 568, 569 (1963), the Board exercised jurisdiction over a private, nonprofit organization engaged in marine research "for its own sake without thought of specific, practical application" and in the teaching of oceanography. On the other hand, in Crotty Bros., New York, Inc., 146 N.L.R.B. 755 (1964), the Board relied on the *Columbia* case in declining jurisdiction over a food service operated at a private, nonprofit college by a profitmaking corporation. See also Massachusetts Institute of Tech., 110 N.L.R.B. 1611 (1954) (jurisdiction asserted).

¹⁵ Office Employees Int'l. Union, Local 11 v. NLRB, 353 U.S. 313 (1957).

¹⁶ LMRA §14(c)(1), 29 U.S.C. 164(c)(1) (1970), *amending*, LMRA §14, states:

The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

¹⁷ To the extent that employees are paid less when not represented by a collective bargaining agent, the employer benefits from cheaper labor.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association . . . tends to aggravate recurrent business depressions, by *depressing wage rates*. . . .

LMRA §1, 29 U.S.C. §151 (1970) (emphasis added). Denial of employees' rights to organize and refusal of employers to bargain collectively, however, "lead to strikes and other forms of industrial strife or unrest. . . ." *Id.*

¹⁸ Cornell Univ., 183 N.L.R.B. 329 (1970).

around them. Campus disorder in the 1960's was viewed not as a local university problem, but as a national issue. Finally, the Board could no longer cite misguided Congressional reports as expressing a legislative intent to keep its "hands off" university labor problems. To the contrary, the Board interpreted section 14(c) of the Act as manifesting a Congressional policy favoring Board assertion of jurisdiction where the operations of the employers in question have a substantial impact on commerce.¹⁹

The Board noted the broad scope of operations of private colleges and universities, such as Cornell and Syracuse, which were directly involved in the case, and their huge operating budgets and payrolls, Federal grants, construction projects and out-of-state students. Increased Federal involvement in the activities of higher education seemed to indicate that employees in higher education should be accorded the same rights and protections as employees in the profit-making sector.²⁰ Furthermore, the failure of the states to enact legislation in the area of labor relations left most nonprofit universities and their employees without the benefit and protection of statutory public policy and procedure.²¹

In a unanimous decision the Board decided to assert jurisdiction over Cornell and Syracuse Universities and to overrule its previous decision in the *Columbia* case.²² In so doing, the Board opened the door to a new era in campus labor relations. Although the Board's discussion in *Cornell* was limited to *private* colleges and universities,²³ increased pressure in Congress and in the various state legislatures would logically mount to apply the same rules to the larger and growing state universities either on the federal level or through state laws.²⁴

¹⁹ 183 N.L.R.B. at 332. The converse implication of §14(c)(1) is a confirmation of the Board's authority to expand its jurisdiction to any class of employers whose operations substantially affect commerce. While the statute does not compel such an expansion of jurisdiction, the Board felt that Congress intended such a result.

²⁰ *Id.*

²¹ *Id.* at 331-32. At the time of the *Cornell* decision, a total of fifteen states had enacted labor-management legislation. *Id.* at 333. Since that time six more states have enacted such legislation, making the total twenty-one. CHRONICLE HIGHER ED., June 10, 1974, at 6, col. 1.

²² 183 N.L.R.B. at 334. The decision is discussed in 35 NLRB ANN. REP. 26(1970).

²³ 183 N.L.R.B. at 334.

²⁴ The Board does not have jurisdiction over "political subdivisions" of states. LMRA §2(2), 29 U.S.C. §152(2)(1970). Thus, if state universities are indeed political subdivisions of states, Board jurisdiction can only be achieved through amendment of the statute. Given favorable circumstances, (such as privately appointed or publicly elected directors or substantial governing autonomy), an argument might be made in a specific case that a state university is not a political subdivision of a state. Any such argument, however, would not encounter easy sailing.

C. *Present Board Policy and Jurisdictional Standards*

In its historic decision in *Cornell*, the Board made it clear that it intended to adopt dollar-volume jurisdictional standards, similar to the standards applied in other contexts of the Board's jurisdiction.²⁵ Because Cornell and Syracuse were two of the largest private universities, the *Cornell* case did not present a good opportunity for the Board to develop the proper minimum standards in this context. The question, therefore, was left open for further adjudication.

In another historic move, the Board decided to utilize its rule-making power to determine the jurisdictional standards applicable to private colleges and universities.²⁶ Only thirty-two days after the decision in *Cornell*, the NLRB's *Notice of Proposed Rule Making* appeared in the Federal Register.²⁷ The notice contained no proposed standard, but merely requested interested parties to submit their views and arguments on the subject. Perhaps the Board felt that in stepping into such a complex sector of interstate commerce it ought first consult the potential contestants before charging full tilt into the fray.

Pursuant to a notice published on December 3, 1970, the Board adopted the following standard:

The Board will assert jurisdiction in any proceeding arising under sections 8, 9 and 10 of the Act involving any private nonprofit college or university which has a gross annual revenue from all sources (excluding only contributions which, because of limitation by the grantor, are not available for use for operating expenses) of not less than \$1 million.²⁸

By the Board's own estimate, based on data submitted by parties responding to the Board's rulemaking notice, this standard "would bring some eighty percent of all private colleges and universities and

²⁵ 183 N.L.R.B. at 334.

²⁶ Section 6 of the Act, 29 U.S.C. §156 (1970), grants the NLRB the authority to "make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter." The Administrative Procedure Act can be found at 5 U.S.C. §§551 *et seq.* (1970). The Board's action was historic because, while it had the power to make rules under the Administrative Procedure Act since 1947, this was the first time it used those procedures to make rules. See Note, *The NLRB's Assertion of Jurisdiction Over Universities*, 32 U. PITT. L. REV. 416, 423 (1971). For a more complete discussion of the NLRB's activity in rule-making see Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970).

²⁷ 35 Fed. Reg. 11270 (1970). The proposal appeared on July 14, 1970.

²⁸ 29 C.F.R. §103.1 (1974). The rule was originally published in 35 Fed. Reg. 18370 (1970), and may also be found in NLRB, RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE §103.1 (1973).

approximately ninety-five percent of all full and part-time nonprofessional personnel within the reach of the Act.”²⁹

While the adopted standard was amenable to a fairly mechanical application, it may have appeared that the Board had not yet decided whether or not the professionals, *i.e.* the faculty, at the university were to be considered employees within the Act. The question soon arose and the Board, in a unanimous decision, summarily dismissed an employer's argument that its professional teaching staffs were not employees within the meaning of the Act.³⁰ This case marked the first time the Board extended the NLRA's protections to faculty members at a university.

The path was then finally cleared for full faculty participation in collective bargaining, at least where the college was a private one and met the Board's \$1 million revenue standard. There has been no major court challenge to this newly developed posture by the NLRB, although such a challenge is reported to be forthcoming.³¹ Wentworth College of Technology, which received an order to bargain with the representative of its faculty,³² will apparently remain steadfast in its refusal to bargain in order to force a court decision.³³ Wentworth's challenge will most likely be based on two grounds: (1) that the college is not engaged in commerce under the meaning of the LMRA, and (2) that the faculty members are not employees within the Act. The first point would seem to be settled against the college's contention,³⁴ but the second may raise some difficult questions regarding who is a "supervisor" under the Act. This question will be discussed in the next section.

III. SCOPE OF BOARD JURISDICTION

A. *Appropriate Units*

Probably the most difficult problem that faces the Board in the

²⁹ 35 Fed. Reg. 18371 (1970).

³⁰ C.W. Post Center, 189 N.L.R.B. 904 (1971).

³¹ CHRONICLE HIGHER ED., May 13, 1974, at 1, col. 4. Previously a United States district court dismissed an action by New York University that sought to enjoin a Board-ordered election among its faculty. *New York Univ. v. NLRB*, 364 F.Supp. 160 (1973). The case was dismissed on the ground that the court lacked jurisdiction, and thus the merits were not reached. Since collective bargaining was rejected in the Board election that followed, the matter was never pursued.

³² 210 N.L.R.B. No. 53, 86 L.R.R.M. 1462 (1974) [here and in other cases where the NLRB official reports have not been formally published, parallel citations will be given to L.R.R.M.].

³³ In order to enforce its orders the Board must apply to a United States court of appeals. See §10(e) of the Act, 29 U.S.C. §160(e)(1970).

³⁴ See, e.g., *Maryland v. Wirtz*, 392 U.S. 183 (1968) (giving an expansive reading to the commerce clause in the context of the Fair Labor Standards Act).

area of collective bargaining by college faculties is the question of the appropriate unit. The Act gives no real guidance on this problem,³⁵ and therefore the Board must rely on its past rulings and the individual circumstances of each case as viewed in the light of Board policy. The Board has stated:

In performing this function [unit determination], the Board must maintain the two-fold objective of insuring to employees their rights to self-organization and freedom of choice in collective bargaining and of fostering industrial peace and stability through collective bargaining. In determining the appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time it creates the context within which the process of collective bargaining must function. Because the scope of the unit is basic to and permeates the whole of the collective-bargaining relationship, each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered.³⁶

1. *C. W. Post* and Early Rulings

The first case in which the Board was called upon to make unit determinations with respect to university teaching staffs was *C. W. Post Center of Long Island University*.³⁷ In finding an appropriate unit comprised of full and part-time faculty members, librarians, research associates, and guidance counselors, the Board ruled on several novel and primary issues. The employer first contended that all the faculty must be "supervisors" since the university's rules allowed full-time faculty members to participate in certain policy decisions and in the selection, promotion, and retention of faculty members.³⁸ Such rules must be considered usual at a university where

³⁵ Section 9(b) of the Act, 29 U.S.C. §159(b)(1970) states:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, that the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit

³⁶ *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137 (1962).

³⁷ 189 N.L.R.B. 904 (1971).

³⁸ Supervisors are defined in §2(11) of the Act, 29 U.S.C. §152(11) (1970), as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other

until recently university government has been viewed as a cooperative effort on the part of the administration, faculty, and even the students. The Board rejected the employer's contention, however, and stated:

Mindful that we are to some extent entering into an unchartered [*sic*] area, we are of the view that the policymaking and quasi-supervisory authority which adheres to full-time faculty status but is exercised by them only as a group does not make them supervisors within the meaning of Section 2(11) of the Act, or managerial employees who must be separately represented.³⁹

The Board next rejected the employer's contention that because of the unique attributes of faculty bargaining, special rules and different principles must be adopted in making unit determinations. The Board decided that the ordinary unit determination rules will apply in these situations, stating:

[W]e are not persuaded that such principles will prove to be less reliable guides to stable collective bargaining in this field than they have proven to be in others⁴⁰

Later in the same year the Board denied a petition from the American Association of University Professors which requested the Board to engage in rule making procedures to set up broad general rules for faculty collective bargaining, or to learn about the range of problems even if it did not promulgate rules.⁴¹ The Board said in its denial:

employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

³⁹ 189 N.L.R.B. at 905.

⁴⁰ *Id.*

⁴¹ The AAUP's petition, which was drafted by Professor Clyde Summers of Yale Law School and Professor Merton C. Bernstein of The Ohio State University College of Law, presented a compelling case for rule making in this situation:

[The Board] must [apply the Act] with no substantial guides drawn from experience with these institutions, and only with guides drawn from settings which may be unsuited for the special character of institutions of higher education. The problems confronted by the Board are particularly acute in representation cases because of the Board's broad range of discretion in representation cases and its heavy responsibility for tailoring bargaining units appropriate for the institutional framework.

The problem confronted by the Board has its source in the uniqueness of the relationship between faculty members and the college or university. This uniqueness has no counterpart in any industrial setting with which the Board has substantial experience and is an integral part of deeply rooted traditions of academic institutions.

AAUP Petition to NLRB for Proceedings for Rule-Making in Representation Cases Involving Faculty Members in Colleges and Universities, June 18, 1971, at 2 [hereinafter cited as AAUP Petition].

[T]o adopt inflexible rules for units of teaching employees at this time might well introduce too great an element of rigidity and prevent the board from adapting its approach to a highly pluralistic and fluid set of conditions.⁴²

Thus the Board had opted for a case-by-case development of the issues. Although this method has been marked by miscalculations, mistakes, and reversals, some of which will be noted below, perhaps the Board will yet be able to develop policies that will make sense when applied to the increasing demands of faculties for collective bargaining.⁴³

2. Department Chairmen

The most notable exclusions from the unit at C. W. Post were the department chairmen. They were usually considered supervisors because of their effective voice in the hiring of new faculty members and in the changing of status of present faculty members. The chairmen also had an active part in resolving faculty grievances. The question whether department chairmen are supervisors is one that arises in practically every faculty unit determination made by the Board.

In *Rosary Hill College*,⁴⁴ the Board held that it would not generally consider department heads to be supervisors. This conclusion was reached on the basis of the Board's experience in previous university cases and on the wide fluctuation found in the responsibilities given to department chairmen at different institutions.

[W]e see no reason at this time for departing from our usual practice of requiring an affirmative showing that the disputed faculty department heads have been given one or more of the indicia of supervisory authority set forth in Section 2(11) or that their recommendations affecting personnel status are relied on and generally followed.⁴⁵

This ruling came after several cases where department chairmen were included in faculty bargaining units, generally on the grounds that their power was advisory only, that their advice was given only

⁴² CHRONICLE HIGHER ED., Aug. 2, 1971, at 1, col. 1.

⁴³ The AAUP may have more correctly foreseen future problems when it stated: Proceeding on a case-by-case basis, limiting each decision to the special facts of each case, will reduce the risk of premature generalization; but some guides or standards must be enunciated if confusion is to be avoided.

AAUP Petition, at 3.

⁴⁴ 202 N.L.R.B. 1137 (1973).

⁴⁵ *Id.*, 82 L.R.R.M. at 1768.

after consultation with the other faculty members, that they were considered to be faculty rather than administrators by the university, and that their duties were essentially similar to those of other faculty members.⁴⁶ On the other hand, department chairmen were excluded as supervisors in several cases where the Board credited such factors as authority in the hiring or firing of faculty members, authority in authorizing temporary leaves of absence by faculty, lack of teaching duties, differential in pay scale, and direction and assignment of departmental support personnel as determinative of the issue.⁴⁷

The issue is not easily resolved. The Board's case-by-case approach is the one method of adjudication that will allow each institution to develop its own structure without necessarily putting the department chairmen in or out of a bargaining unit. The clearest guidelines in this regard are the specific criteria listed in Section 2(11) of the Act. In a situation where collective bargaining is contemplated, the duties given to department chairmen will be carefully watched by both faculty members and administrators.

One criticism that can be properly directed at the NLRB is that, rather than pointing to specific important factors that have caused the Board to rule one way or the other on the status of department chairmen, Board opinions reiterate every conceivable factor that might tend to support its conclusion. Thus while the Board maintains flexibility, future parties to NLRB proceedings are not given sufficient standards by which their own affairs can be structured.⁴⁸

On the other hand, the status of department chairmen is probably the most unique unit determination problem. Absent agreement of the parties, the question will invariably come up in Board election cases. By maintaining an open-ended, case-by-case method with regard to these employees, the Board can reach equitable results in individual cases without having to strain around established rules.

3. Part-time Faculty

A second major area of concern in unit determinations is the inclusion or exclusion of part-time faculty members. The Board's original position was that such part-time employees should be in-

⁴⁶ See *Tusculum College*, 199 N.L.R.B. No. 6, 81 L.R.R.M. 1345 (1972); *Florida Southern College*, 196 N.L.R.B. 888 (1972); *University of Detroit*, 193 N.L.R.B. 566 (1971); *Fordham Univ.* 193 N.L.R.B. 134, 137-39 (1971).

⁴⁷ See *Point Park College*, 209 N.L.R.B. No. 152, 85 L.R.R.M. 1542 (1974); *Fairleigh Dickinson Univ.*, 205 N.L.R.B. No. 101, 84 L.R.R.M. 1033 (1973); *Syracuse Univ.*, 204 N.L.R.B. No. 85, 83 L.R.R.M. 1373 (1973); *Adelphi Univ.*, 195 N.L.R.B. 639 (1972).

⁴⁸ See Comment, *The Bargaining Unit Status of Academic Department Chairmen*, 40 U. CHI. L. REV. 442 (1973).

cluded under ordinary unit determination rules.⁴⁹

In *C. W. Post* the Board focused on similarities in educational background, teaching activities, and participation in faculty meetings between adjunct and full-time faculty members. Under the ordinary rules this was sufficient to include the adjunct faculty in the unit as regular part-time employees.⁵⁰ This inclusion of adjunct or part-time faculty members was later refined with the adoption of the "4-to-1" rule.⁵¹ This rule held that part-time faculty would be included if their teaching duties were at least one-quarter of the normal full-time teaching load. Then in 1973 the Board announced:

We are now convinced that the differences between the full-time and part-time faculty are so substantial in most colleges and universities that we should not adhere to the principle announced in the New Haven case.⁵²

The Board split 3-2 over the exclusion of part-time faculty with the dissent focusing on the inflexibility of the Board's newly announced position, on the problems inherent in fragmenting labor relations on the campus, and on the overriding similarities in the functions performed by both groups, *i.e.* teaching.⁵³

In contrast to the situation with department chairmen, the issues here are more clearly defined and in need of a less flexible rule. The Board's decision to exclude part-time faculty from a unit of full-time faculty is a sound one. Part-time teachers frequently have substantial interests or careers outside the university that render their interests at the bargaining table radically different than those of their full-time colleagues. Also, because many part-time faculty members are only present at the school for the duration of their classes, they do not participate in some aspects of faculty employment which may be of vital importance to full-time faculty members.

4. Professional Support Personnel

With regard to professional support personnel, such as librarians, research associates, and counselors, the Board has generally

⁴⁹ *C.W. Post Center*, 189 N.L.R.B. 904 (1971); *University of New Haven, Inc.*, 190 N.L.R.B. 478 (1971).

⁵⁰ 189 N.L.R.B. at 905-06. *See, e.g.*, *G. C. Murphy Co.*, 171 N.L.R.B. 370 (1968).

⁵¹ *University of Detroit*, 193 N.L.R.B. 566 (1971).

⁵² *New York Univ.*, 205 N.L.R.B. No. 16, 83 L.R.R.M. 1549, 1552. In the *New Haven* case the Board held that regular part-time faculty must be included in the same unit as full-time faculty, absent agreement of the parties to exclude them. *University of New Haven, Inc.*, 190 N.L.R.B. 478 (1971).

⁵³ 205 N.L.R.B. No. 16, 83 L.R.R.M. at 1555-58.

included them in units of faculty members.⁵⁴ In *C. W. Post* the Board determined that the librarians were professional employees within the Act who performed functions closely related to teaching and shared many of the same benefits as the other unit employees.⁵⁵ Essentially, in making any unit determinations, the Board looks for a "community of interest" among the employees involved. If such a community of interest is found, the two groups of employees are presumed to be properly included in the same unit.⁵⁶

The rationale with regard to support personnel is that these people are a closely allied professional group whose ultimate function converges with that of the faculty. They perform services that are essential in the educational process. Of course, to the extent that such employees could be held not to be professionals within section 2(12) of the Act (such as library workers with no special training who have mechanical or clerical duties), they would be excluded from the faculty unit.

Arguments against inclusion of professional support staff generally emphasize that these employees are not included within the tenure system and are therefore not involved in similar procedures for appointment and promotion. Furthermore the working hours are generally different, requiring different supervision. Support personnel do not generally participate in the day-to-day affairs of academic departments which are the basic units of faculty organization and supervision, and they frequently are not involved in the traditional university governance systems in which faculties have participated. Finally, the historic academic freedoms have traditionally not been

⁵⁴ *E.g.*, New York Univ., 205 N.L.R.B. No. 16, 83 L.R.R.M. 1549 (1973); Catholic Univ., 201 N.L.R.B. 929 (1973); Florida Southern College, 196 N.L.R.B. 888 (1972); *C.W. Post Center*, 189 N.L.R.B. 904 (1971).

⁵⁵ 189 N.L.R.B. at 907. Section 2(12) of the Act, 29 U.S.C. §152(12) (1970), defines professional employee in the following manner:

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes. . . .

⁵⁶ Note the special considerations that must be made when professional employees are included in any unit. Section 9(b) of the Act, 29 U.S.C. 159(b) quoted in note 35, *supra*. A determination in the *C.W. Post* case that the librarians were professional employees obviated a special vote otherwise required by §9(b).

extended to support personnel.⁵⁷ Despite these arguments, the NLRB has opted for broader, more-inclusive units to avoid fragmenting labor relations on the campus. As we shall see later, however, this goal has been sacrificed in other circumstances.

Questions have also arisen concerning the supervisory status of support personnel where their duties include hiring, firing, or directing nonunit employees. An example would be the trained librarian who directs library workers whose duties are essentially clerical or non-discretionary in nature, or a research associate who directs non-professional employees engaged in a project. It had been previously held that department chairmen, although playing a role in selecting their secretaries and exercising some direction over them, were not supervisors since they lacked authority directly to hire and to fire the secretaries.⁵⁸ To further resolve such questions the Board adopted a "fifty percent" rule whereby an employee whose principal duties were of the same character as those of the other members of the unit would not be excluded because of sporadic exercise of supervisory authority over nonunit employees, as long as these supervisory duties consumed less than fifty percent of the employee's working time.⁵⁹

This "fifty percent" rule will apply to all support personnel as well as to department chairmen or regular faculty members. Thus, if a librarian who would otherwise be included in the unit, spends fifty percent or more of his or her time directing nonunit library workers, he or she will be excluded from the unit. Likewise, if a faculty member spends fifty percent or more of his or her time directing nonunit laboratory workers, he or she will be excluded from the unit.

While the application of this rule seems to be simple enough, there are definite difficulties in determining exactly what figure to use for total working time. While support personnel, such as librarians, usually have regular working hours, most faculty members do not work a typical "9-to-5" schedule and individual "working time" may vary greatly. In these circumstances, the adoption of a single figure for the application of this rule may be inequitable if the unit includes both faculty members and support personnel.

This is only symptomatic of the larger problems involved in the Board's decision to include support personnel in units of faculty members in the first instance. The disparity between these two groups will be reflected at the bargaining table in the librarians' lack of interest in teaching loads, class sizes, tenure, and other issues that

⁵⁷ See generally, McHugh, *Collective Bargaining with Professionals in Higher Education: Problems in Unit Determinations*, 1971 Wis. L. Rev. 55.

⁵⁸ Fordham Univ., 193 N.L.R.B. 134 (1971).

may be at the heart of the faculty interest. By combining faculty members with support personnel for bargaining purposes, the Board may inadvertently water down these employees' rights by compromising their ability to represent their individual interests. The interests of both groups will be best served by providing for separate units.

5. Personnel and Grievance Committee Members

Another significant question of supervisory status of faculty members has been raised in connection with faculty members who serve on personnel and grievance committees. In *Adelphi University*,⁶⁰ the Board decided to include such committee members in the unit by a 2-1 decision, relying on *C. W. Post*. The distinction between the two cases, which was forcefully argued in the dissent, was that the *Adelphi* personnel committee consisted of eleven faculty members, whereas in *C. W. Post*, an entire 600-member faculty shared personnel authority. The function of the personnel committee in *Adelphi* was to pass on all matters of tenure, hiring, promotions, and granting of sabbatical leaves-of-absence. Although the board of trustees held the final authority, the record showed that the committee's recommendations were almost always followed.⁶¹ The grievance committee had three members who heard and made recommendations concerning the adjustment of all faculty grievances, except dismissal proceedings.⁶²

The Board stated that the committees in this case, as in *C. W. Post*, involved the concept of collegiality, wherein power and authority is vested in a body composed of one's peers and colleagues, and that this is not analogous to the traditional authority structures contemplated by the Act and its concept of "supervisor."⁶³ Consequently, the Board concluded that the members of the committees did not fit the traditional role of "supervisor" as that term is thought of in the commercial world, and that these faculty members should not be disenfranchised merely because they have some measure of quasi-collegial authority either as an entire faculty or as representatives elected by the faculty.

⁵⁹ *Adelphi Univ.*, 195 N.L.R.B. 639 (1972).

⁶⁰ *Id.*

⁶¹ *Id.* at 647-48.

⁶² *Id.*

⁶³ The Board noted that the statutory concept of "supervisor" grows out of the fact that commercial organizations are pyramidal, with authority delegated from the top in bits and pieces toward the bottom. In this instance the board of trustees (at the top of the pyramid) has seen fit to seek, in a formalized manner, the advice of the faculty (the base of the pyramid) through these committees. *Id.* at 648.

6. Separate Units for Professional Schools

One glaring exception to the Board's general policy against fragmenting labor relations has been in the area of professional schools, notably law schools. In *Fordham University*⁶⁴ the Board made an early decision that a separate unit of law school faculty could be appropriate for bargaining. The reasons cited by the Board for such a conclusion included the separate location of the law building and its lack of use by other units of the university, the lack of any interchange of faculty between the law school and other schools, the different tenure arrangement and salary structure, separate faculty committees, separate and external regulation of class hours by the state courts and bar associations, the lack of departments within the school, and the use of a different calendar.⁶⁵

The Board has recently excluded the medical school from a faculty representation election at the University of Miami on grounds similar to those in the *Fordham* case.⁶⁶ Also excluded at the University of Miami was the school of marine science. Thus, the trend seems to be toward separate units where a sufficient amount of distinctness or separation can be shown.⁶⁷

While the Board has clearly indicated that an overall unit would also be appropriate,⁶⁸ one might question the advisability of allowing separate units in professional schools or anywhere else. It is well known that salary scales are not uniform among the many disciplines at a university. Faculty members at professional schools such as law and medicine have been paid at higher rates in order to effectively compete with salaries available in private practice. One commentator has suggested that bargaining be carried on through a "joint bargaining committee" that would be formed through proportional representation:

⁶⁴ 193 N.L.R.B. 134 (1971).

⁶⁵ *Id.* at 136-37. In a footnote the Board stated:

Many of the factors set forth herein are equally applicable to the University's other professional schools. As *an overall unit including the faculty of professional schools is appropriate*, and as no party contends that the faculty of any professional school other than the law school should constitute a separate unit, we need not pass upon the appropriateness of any such separate unit.

Id. at 137 n.11 (emphasis added).

⁶⁶ University of Miami, 213 N.L.R.B. No. 64, 87 L.R.R.M. 1634 (1974).

⁶⁷ There may be a conflict between the Board's policy and that of other institutions involved in this area. A recently promulgated American Bar Association rule requires accredited law schools to be associated with a university, thus causing some previously independent law schools to affiliate with universities.

⁶⁸ See note 65, *supra*. See also Fairleigh Dickinson Univ., 205 N.L.R.B. No. 101, 84 L.R.R.M. 1033 (1973) (election ordered in overall unit that included dental school); New York Univ., 205 N.L.R.B. No. 16, 83 L.R.R.M. 1549 (1973) (law school unit).

In the composition of a joint bargaining committee, faculty members could be given the option of being represented either through their departments or divisions or through independent constituencies whenever a sufficient number choose to become a constituent group for that purpose.⁶⁹

Such a committee, however, could be composed of a hundred or more people at a large university, and the arrangement would appear to be quite unwieldy. While this may avoid the undesirable result of completely sacrificing the interests of a minority to the majority, the added complexity hardly makes it worthwhile. Absent a workable alternative, separate units, then, appear to be the best solution to the problem.

Perhaps the real mistake that the NLRB has made was to blindly apply the commercial, industrial rules of unit determination to a completely different area of labor relations.⁷⁰ If the Board has truly entered into an "unchartered area,"⁷¹ old rules should not be applied. The Board found this to be true with respect to part-time faculty members, and in other areas, such as with support personnel, more reversals may be expected.

In the area of separate units the Board has shown some innovation by departing from its normal, industrial procedure for determining a separate unit. Rather than ordering the typical "Globe" election⁷² to determine if the law school should have a separate unit, the Board, in *Syracuse University*,⁷³ ordered a self-determination election whereby the law faculty could choose between inclusion in the overall unit, separate representation, or separate nonrepresentation. This procedure gave the law faculty a broader choice than the industrial procedure, and would allow the law faculty to vote to remain

⁶⁹ Sands, *The Role of Collective Bargaining in Higher Education*, 1971 WIS. L. REV. 150, 169.

⁷⁰ See text accompanying note 40 *supra*.

⁷¹ C.W. Post Center, 189 N.L.R.B. 904, 905 (1971).

⁷² *Globe Machine and Stamping Co.*, 3 N.L.R.B. 294 (1937). In a typical "Globe" election employees vote in two groups, with the minority group of skilled employees having the option of voting for representation in a separate unit. If separate representation is not favored by the majority in the skilled unit, then their votes are pooled with those of the other voting group to determine the question of representation in the overall unit. Thus there could be four possible results to such an election: (1) two separate bargaining agents, (2) a separate agent for the skilled group but no agent for the others, (3) one overall agent, and (4) no agents. The Board's ruling in *Syracuse Univ.*, 204 N.L.R.B. No. 85, 83 L.R.R.M. 1373 (1973), parallels the procedure regularly followed as to professional employees pursuant to the statutory command of Section 9(b)(1) of the Act, 29 U.S.C. § 159(b)(1) (1970), quoted note 35, *supra*. This procedure also allows separate representation by the same agent for the two groups, or no agent for the "professional" group (law faculty) but a separate agent for the others.

⁷³ 204 N.L.R.B. No. 85, 83 L.R.R.M. 1373 (1973) (two dissenters would have used the traditional craft severance method).

unrepresented while the remainder of the faculty voted for a bargaining agent. This choice would be unavailable in a "Globe" election.

7. Other Unit Determinations

The Board has made other decisions in unit determinations concerning the many and varied employees who might be included in a faculty unit. The Board has generally allowed "terminal contract" faculty to vote in representation elections.⁷⁴ These are faculty members who have been hired on a year-to-year nontenured basis and have been informed that their contracts will not be renewed. Universities have frequently objected to their voting for obvious reasons. Deans, on the other hand, have been generally excluded as supervisors,⁷⁵ although in some cases assistant deans have been included where they have some teaching duties and their interests are more closely aligned with those of the rest of the faculty.⁷⁶

The Board has gone both ways with regard to athletic coaches,⁷⁷ and has excluded ROTC professors who are officers in the armed forces.⁷⁸ In an interesting reversal, the Board held that members of a religious order would be excluded from a lay faculty bargaining unit. The Board felt, essentially, that an oath of loyalty to a religious order that also had a role in the administration of the university created an overwhelming conflict of interest for these faculty members. Moreover, it was concluded that the economic interests of the two groups did not coincide. The members of the religious order had taken a vow of poverty and were dependent on the order itself for their needs. The lay faculty, however, were dependent on their own earnings for their support and that of their families.⁷⁹ Graduate teaching assistants have been excluded primarily on the ground that they are basically students and do not share a sufficient community of interest with the faculty members to warrant their inclusion in the unit.⁸⁰

⁷⁴ *E.g.*, New York Univ., 205 N.L.R.B. No. 16, 83 L.R.R.M. 1549 (1973); Tusculum College, 199 N.L.R.B. No. 6, 81 L.R.R.M. 1345 (1972).

⁷⁵ *E.g.*, Florida Southern College, 196 N.L.R.B. 888 (1972); C.W. Post Center, 189 N.L.R.B. 904 (1971).

⁷⁶ *E.g.*, University of San Francisco, 207 N.L.R.B. No. 15, 84 L.R.R.M. 1403 (1973); Catholic Univ., 201 N.L.R.B. 929 (1973).

⁷⁷ *E.g.*, Point Park College, 209 N.L.R.B. No. 152, 85 L.R.R.M. 1542 (1974) (excluded from unit); Manhattan College, 195 N.L.R.B. 65 (1972) (included).

⁷⁸ *E.g.*, Florida Southern College, 196 N.L.R.B. 888 (1972); Manhattan College, 195 N.L.R.B. 65 (1972).

⁷⁹ *Compare* Seton Hill College, 201 N.L.R.B. 1026 (1973) (excluding members of religious order and overruling prior determination) *with* Fordham Univ., 193 N.L.R.B. 134 (1971) (members of religious order included).

⁸⁰ *E.g.*, Adelphi Univ., 195 N.L.R.B. 639 (1972).

As a final note in unit determinations, the question has arisen whether a campus-wide or university-wide unit is proper where a university has several campuses. The Board seems to be leaning in the direction of a university-wide unit because of the similarities in conditions at all campuses.⁸¹ Furthermore, most institutions generally have a single, centralized administration which governs the entire university. However, in one case, the Board rejected a university-wide unit where considerable distance between the campuses was a significant factor.⁸²

B. Limitation of the Exercise of Jurisdiction to "Private" Colleges and Universities.

When the Board assumed jurisdiction over colleges and universities in 1970, it made clear that this extension was limited to "private" institutions.⁸³ Indeed, the LMRA limits the Board's statutory jurisdiction in the exclusion of "the United States or any wholly owned Government corporation, . . . or any State or political subdivision thereof . . ." from the definition of "employer."⁸⁴ However, the extent of this exclusion is far from crystal clear.

In a 3-1 decision the Board declined jurisdiction over Temple University.⁸⁵ Temple received substantial assistance from the Commonwealth of Pennsylvania and was the subject of the Temple University-Commonwealth Act of 1965.⁸⁶ Under the provisions of this statute Temple was established "as an instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth system of higher education."⁸⁷ The statute provides for a thirty-six member board of trustees of which twelve are named by the Commonwealth.⁸⁸ The statute also has provisions concerning resident and nonresident fee schedules, funds for capital improvements, and appropriations from the state government. Thus, this act established substantial ties between Temple and the state government.

The Board agreed nonetheless that Temple was an "employer" within the meaning of the Act, but declined in its discretion to assert jurisdiction.⁸⁹ The Board also presumed that the Temple employees

⁸¹ See Fairleigh Dickinson Univ., 205 N.L.R.B. No. 101, 84 L.R.R.M. 1033 (1973).

⁸² Cornell Univ., 202 N.L.R.B. 290 (1973).

⁸³ Cornell Univ., 183 N.L.R.B. 329 (1970).

⁸⁴ LMRA §2(2), 29 U.S.C. §152(2) (1970).

⁸⁵ Temple Univ., 194 N.L.R.B. 1160 (1972).

⁸⁶ PA. STAT. ANN. tit. 24, §§2510-1 *et seq.* (Supp. 1974).

⁸⁷ *Id.* §2510-2.

⁸⁸ *Id.* §2510-4.

⁸⁹ 194 N.L.R.B. at 1161.

would be covered by Pennsylvania's Public Employee Relations Act.⁹⁰ These two factors—substantial ties with the state and an adequate and applicable state labor relations act—seemed to be at the heart of the Board's decision. The result illustrates the NLRB's reluctance to plunge into full jurisdiction over colleges and universities, and it foreshadows, perhaps, a relinquishment of Board jurisdiction to states willing to regulate this sector of employment.

The Board's decision in *Temple University* is a useful one if the basic rationale is the availability and adequacy of a state labor relations statute. This is a legitimate use of federal power which will allow states to take control of this sector of collective bargaining if they so desire. Where a state does not have laws regulating labor-management relations, however, the Board should assert its jurisdiction to the full extent of its powers. The fact that a university in such a state has substantial ties with that state should not be sufficient to warrant discretionary denial of jurisdiction if the university is an employer under the Act. Otherwise, the disparity of treatment from one state to the next would be substantial.

Another significant decision came down when the Board declined jurisdiction over Howard University.⁹¹ This also was a split decision which the Board based on the "unique relationship" between Howard and the federal government. Howard receives a substantial amount of its revenues from Congress, is open to inspection by the United States Office of Education, and has maintained a parity with the federal government in pay scales and fringe benefits for nonacademic employees.

The *Howard* decision goes beyond *Temple* in one very important aspect—in *Howard* there was no applicable local law to which the

⁹⁰ PA. STAT. ANN. tit. 43, §§1101.101 *et seq.* (Supp. 1974). In a proviso to section 10(a) of the Act, 29 U.S.C. § 160(a) (1970), the Board is given the power to relinquish jurisdiction to state agencies. In such a case, however, the state law must be consistent with the LMRA:

[T]he Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

LMRA § 10(a), 29 U.S.C. § 160(a) (1970).

⁹¹ Howard Univ., 211 N.L.R.B. No. 11, 86 L.R.R.M. 1389 (1974) (3-2 decision). In its opinion the Board stated that, ". . . Howard enjoys a unique relationship with the Federal Government unmatched by any other university to which our discretionary jurisdictional yardsticks apply." *Id.*, 86 L.R.R.M. at 1391. See also Association of Hebrew Teachers, 210 N.L.R.B. No. 132, 86 L.R.R.M. 1249 (1974) (3-1 decision where the Board declined jurisdiction over a nonprofit organization which operated after-school classes even though the Mid-rasha College section offered regular undergraduate and graduate degrees).

employees or employer could turn. Thus the Board denied to the employees the rights guaranteed by the Act because of the benefits given to them by the employer and the government. The *Howard* decision illustrates the danger in the operation of discretionary jurisdiction. No one would suggest in the context of a purely private industrial employer that the Board should not assert its jurisdiction because the employees were well paid. Although *Howard* is a private employer, its "unique relationship" with the federal government puts its employees in a no-man's land of labor relations law.

With higher education relying increasingly on government subsidies and grants, one might well wonder how long it will take before the Board's jurisdiction is whittled away completely by such discretionary decisions. If the Board's purpose is to put pressure on state legislatures or if it is depending upon some kind of psychological ripple-effect to bring uncovered employers into line, this should be made known. The uncertainty produced by the *Howard* decision can go a long way toward inhibiting development of sound labor relations on the campus.

IV. SUBJECTS OF COLLECTIVE BARGAINING

Under the Act, a collective bargaining agent is charged with negotiating for "wages, hours . . . , or other conditions of employment"⁹² on behalf of the unit employees. In a 1958 decision, the Supreme Court established three categories of bargaining proposals and established three sets of rules for them.⁹³ These are (1) illegal subjects, (2) mandatory subjects, and (3) voluntary subjects. The first category includes provisions that would be illegal under the LMRA, the second includes the traditional "wages, hours, and other conditions of employment," and the third includes any legal provisions outside the second category.

While salaries and fringe benefits may be the first and primary collective bargaining issue,⁹⁴ one might expect that faculty representatives may well be highly concerned about other issues such as educational policy and university government. In its broadest sense, the phrase "terms and conditions of employment" includes many matters outside of simply wages and hours. Faculty members are highly interested in areas such as subject matter assignments, tenure, and the allocation of funds within and among departmental units. Further-

⁹² LMRA §9(a), 29 U.S.C. 159(a) (1970).

⁹³ NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958).

⁹⁴ See the table compiled in Allen, *Organizing the Eggheads: Professors and Collective Bargaining*, 23 LAB. L.J. 606, 612 (1972).

more, faculty members might be expected to bargain about the selection of officers and trustees of the university or the process through which institutional decisions are reached. In the industrial world these have not been traditional areas for collective bargaining; in the education sphere, however, we might expect that these subjects will be held to be mandatory areas of bargaining.⁹⁵ There have been as yet no Board decisions that might light the way. As a child of the '70's, collective bargaining on the campus has hardly begun to crawl.

It has been further pointed out that while faculty participation in university government is a tradition, the cyclical world of collective bargaining, as it is known in industry, is ill-suited to the ongoing needs of a university.⁹⁶ Rather than postponing problems that arise during the term of a contract to an annual or biannual negotiating session, significant problems on the campus should be given immediate attention. To attempt to use the industrial model may be to invite disorder and chaos. Unless the whole inner structure of the academic community is to be altered, the problem of university government must be carefully surveyed before any attempt is made to transplant industrial and commercial organs into the academic body.

Based on its performance so far, there is every reason to expect that the NLRB will apply traditional rules to such issues as the scope of mandatory bargaining and bargaining conduct until it is shown that they are unworkable. In some cases this may be quite proper. For example, in a recent case the Board ruled that a university must provide a collective bargaining agent with budget information if the administration uses financial problems as a justification for dismissing employees.⁹⁷ This squares with established Board doctrine as applied to industrial employers,⁹⁸ and the Board is on solid ground in applying it to universities. The Board should not, however, allow such an easy rule of applicability to lull it into thinking that collective bargaining on the campus presents no new problems in this area.

In the area of unit determinations, for example, the individuals and relationships involved, and the job classifications and duties are so different from those in the factory that the Board would best fulfill the policies of the Act by discarding all old rules in its determination of an academic unit. Likewise, the scope of bargainable issues is an area where the differences between the university and the factory may translate into significantly different rules for collective bargaining.

⁹⁵ See Brown, *Collective Bargaining in Higher Education*, 67 MICH. L. REV. 1067 (1969).

⁹⁶ Sands, *The Role of Collective Bargaining in Higher Education*, 1971 WIS. L. REV. 150, 153-59.

⁹⁷ CHRONICLE HIGHER ED., May 20, 1974, at 4, col. 1.

⁹⁸ See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

The history of labor relations between the parties, the structure of university government and the expectations of the parties might all be important factors in deciding what issues ought to be the subject of bargaining. For example, if a faculty union cannot insist on an academic freedom clause in its contract, or agree with the university that this will either fall within the jurisdiction of the university government or otherwise be left outside the collective bargaining talks, faculty members may be effectively discouraged from seeking collective representation. The Board's initial position should be open-ended and free from industry-oriented rules. The key here should be to allow the parties to come to a mutual understanding on the grounds for bargaining without sacrificing prior agreements.

The question of the scope of collective bargaining by faculties is open to debate and to practical development.⁹⁹ Board cases to date have dealt primarily with questions of representation and proper bargaining units. As these issues become settled, and as more bargaining agents sit down with administrators to work out contracts, the Board will be faced with more questions regarding the proper scope of bargaining. This area promises to be one of rapid development in the next few years.

V. THE FUTURE: CHANGING BOARD POLICY AND LEGISLATIVE ACTION

Collective bargaining is clearly a reality on the campus today,¹⁰⁰ and unless the Board's backstepping in *Temple University* and in *Howard University* is evidence of a trend toward getting out of the business, it can reasonably be expected that the Board will consciously or unconsciously develop rules and patterns by which collective bargaining in colleges and universities can grow in an orderly and peaceful manner. The Board's tendency to keep all options open and to remain flexible will be a boon since all parties are feeling their way in this "unchartered area." It has been fifteen years since Congress has made any significant contribution to the NLRB's activities in labor relations,¹⁰¹ and the Board's occasional reluctance to act could be cured with proper direction from Congress.

One possible legislative solution is common labor-management

⁹⁹ Scholars and commentators have written extensively on this subject. See the excellent bibliography published by the Manpower and Industrial Relations Institute at the University of Alabama, J. NORTH, *COLLECTIVE BARGAINING IN HIGHER EDUCATION* (1972).

¹⁰⁰ See *CHRONICLE HIGHER ED.*, June 10, 1974, at 24, col. 1 (reporting that 338 colleges and universities have chosen collective bargaining agents).

¹⁰¹ The Labor Management Reporting and Disclosure Act, 73 Stat. 541 (1959).

regulation for both public and private higher education. At present the NLRB will take jurisdiction over most private institutions applying to it, leaving public institutions to the vicissitudes of state legislation. Common problems in both types of institutions militate toward common regulation, especially as private institutions become more dependent upon public monies. One bill now pending before Congress would accomplish this by putting public employees under the jurisdiction of the NLRB.¹⁰²

The proposed solution would be to simply strike the words "or any State or political subdivision thereof" from section 2(2) of the Act.¹⁰³ This slight change would bring virtually all state employees under the Act. While this may be a viable answer for faculty members employed in public institutions, one might seriously question the wisdom of granting the right to strike, which is an integral part of the LMRA,¹⁰⁴ to police and fire department employees. Thus the objection to this legislative solution is not that it gives professors the right to strike, but that it gives that right to *all* public employees without discrimination.

This difficulty could be avoided by coupling the blanket inclusion of public employees with special provisions and limitations where necessary. This could provide a much more responsible solution to the question of public employee collective bargaining, but it may overburden the already crowded docket of the NLRB. Furthermore, the newly added burden would not present familiar problems, but would pose novel issues which would require additional consideration.

A second solution is represented by the several proposed public employee labor relations acts.¹⁰⁵ Their difficulty *vis-à-vis* higher education is that public and private institutions would then be put under separate sets of laws. Furthermore, at least with regard to the cited bills, these proposals do not show a substantial recognition of the unique problems of collective bargaining in academia. Thus, this legislation, if enacted, would provide no further guide in such areas as unit determination and the scope of bargainable issues than we

¹⁰² H.R. 9730, 93d Cong., 1st Sess. (1973).

¹⁰³ See note 6, *supra*, for the text of section 2(2).

¹⁰⁴ LMRA §13, 29 U.S.C. §163 (1970), recognizes that the right to strike is inherent in the Act:

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

¹⁰⁵ *E.g.*, S.3295, 93d Cong., 2d Sess. (1974); H.R. 8677 93d Cong., 1st Sess. (1973). While these statutes would apply to public educational institutions, jurisdiction over private colleges and universities would be left to the NLRB.

have already under the LMRA. If the Congress or a state legislature is going to invest the time necessary to enact thoughtful statutes, it should at least consider special provisions for collective bargaining in higher education.

There are significant differences between public and private institutions which may warrant separate treatment under the law. For example, in the public area the state government itself, through the legislature, will most likely become the prime negotiator on the management side, rather than the particular university's administrators, merely because of the legislature's control of the purse strings. At a private institution the administrators and board of trustees directly control the money. This would seem to militate toward a state-wide bargaining unit for the public institutions rather than separate units at each university.

On the other hand, these differences could be provided for by a carefully drafted statute that would include both public and private institutions, such as amendments to the LMRA. This would recognize the distinctions, but would apply the more substantive parts of the law, such as employer and employee rights, unfair labor practices, and the right to strike, in an even-handed and uniform fashion. Questions on the supervisory status of certain employees and the scope of bargainable issues will also be similar at both public and private institutions. In short, the similarities in collective bargaining issues at private and public colleges and universities outweigh the differences, and the most desirable statutory solution would embrace institutions in both sectors.

Another source of possible solutions lies in the area of state legislation. Although only twenty-one states have adopted collective bargaining procedures for faculty members in public institutions,¹⁰⁶ more state laws seem certain to follow as the impact of NLRB jurisdiction spreads. Whereas federal legislation must necessarily be broad if it is to apply on a national scale,¹⁰⁷ states may, to a greater degree, tailor their statutes to the needs of the parties involved.

The broader question of collective bargaining in higher education is not limited to faculty members, but extends to middle management professionals,¹⁰⁸ other support personnel, (to the extent that they

¹⁰⁶ See *CHRONICLE HIGHER ED.*, June 10, 1974, at 6, col. 1.

¹⁰⁷ For example, the LMRA has no special provisions for student involvement in collective bargaining on the campus either as students or as employees. Thus the Board has excluded students from a unit of clerical workers. *Barnard College*, 204 N.L.R.B. No. 155, 83 L.R.R.M. 1483 (1973).

¹⁰⁸ This category would include, for example, professional employees in the dormitories and university business offices.

are not identified as faculty members), nonacademic blue-collar workers and students. In dealing with these groups in closer proximity, the state legislatures may be better informed than Congress on the issues involved. The academic community, as well as the public, would be best served by the enactment of specific legislation tailored to its unique characteristics and needs.¹⁰⁹

Thus, a bill in the Virginia legislature,¹¹⁰ supported by the American Association of University Professors, makes provisions for separate units for faculty members and for coexistence of faculty senates and faculty bargaining representatives.¹¹¹ While the Virginia bill covers public employees in general, recognition of special problems in academia is a step in the right direction. A specific statute aimed solely at academic employees could provide for unit determinations, scope of bargaining, prohibited practices, and the right to strike without having to make qualification, limitations, and provisos for the various other groups of public employees. Furthermore, such a state statute could cover all institutions of higher education rather than limit itself to public institutions.¹¹²

Although law-making on both the federal and state level is fraught with special interest politics and other, perhaps unprincipled, considerations, state legislatures generally have the further handicap of fewer resources, smaller staffs, and less expertise than Congress. The national need for effective state labor laws may bring such groups as the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and the American Bar Association to the aid of the state law makers. With such assistance, state legislation at least is a viable means for protecting the interests of employees and employers in the academic world. At best, the state legislators could set the pace in recognizing the special nature of labor relations at our colleges and universities.

The problem is not irresolvable. The NLRB, despite its handicap in operating under an industry-oriented statute, has played a significant part in facing some initial questions. What is needed now is thoughtful legislative response to the growing demand for collective bargaining in higher education. Without such a response, knee-jerk

¹⁰⁹ See Livingston & Christensen, *State and Federal Regulation of Collective Negotiations in Higher Education*, 1971 Wis. L. REV. 91.

¹¹⁰ H.B. 1808, Va. Gen. Assembly, 1973 Sess.

¹¹¹ *Id.* at §§5(4)(c) & 6(4).

¹¹² While this would create concurrent jurisdiction with the NLRB, the Board could decline jurisdiction, as it did in *Temple*, where the state statute adequately protects the parties involved. See note 90, *supra*.

reactions and short-term resolutions could pave the way toward a new era of campus disorder.

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